

**IN THE MICHIGAN SUPREME COURT
On Bypass Application from the Ingham County Circuit Court**

ELLEN M. ANDARY, a legally Incapacitated adult, by and through her Guardian and Conservator, MICHAEL T. ANDARY, M.D., PHILIP KRUEGER, a legally Incapacitated adult, by and through his Guardian, RONALD KRUEGER, and MORIAH, INC., d/b/a EISENHOWER CENTER, a Michigan Corporation,

Supreme Court No. 164772
Court of Appeals No. 356487
Ingham County Circuit Court
Case No. 19-738-CZ
Hon. Wanda M. Stokes

Plaintiffs-Appellants,

v

USAA CASUALTY INSURANCE COMPANY, a foreign corporation, and CITIZENS INSURANCE COMPANY OF AMERICA, a Michigan Corporation,

Defendants-Appellees.

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**AMICUS CURIAE BRIEF OF BRAIN INJURY ASSOCIATION OF MICHIGAN
IN SUPPORT OF PLAINTIFFS' RESPONSE TO MOTION TO STAY
PRECEDENTIAL EFFECT OF COURT OF APPEALS' PUBLISHED DECISION**

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STATEMENT OF AMICUS CURIAE INTEREST BIAMI¹

The Brain Injury Association of Michigan (“BIAMI”) is a non-profit organization that serves as the conduit between approximately 200,000 brain injury survivors living in Michigan and the nation’s largest network of brain injury providers. BIAMI has over 1,000 members, over 500 of whom are brain injury survivors. 18,000 auto accident survivors living with traumatic brain injuries are currently receiving no-fault benefits in Michigan, and approximately 1,600 of those are receiving 24-hour lifetime care. According to the Michigan Public Health Institute, motor vehicle accidents is the second leading cause of traumatic brain injuries in the state (the first is falls).

At its core, BIAMI is a patient advocacy organization that strives to establish, protect and preserve the laws, policies and systems that comprise Michigan’s brain injury care. BIAMI also seeks to help provide immediate and equal access to these services for all brain injury survivors and their families. BIAMI works tirelessly on a grassroots level through its 20 chapters and support groups across the state, which meet monthly to provide support and community involvement opportunities for brain injury survivors and family members. BIAMI also offers training to family members so that they can learn how to provide appropriate care to their loved ones who are brain injury survivors.

BIAMI presents this amicus brief to shed light on how the retroactive application of MCL 500.3157(10) has gravely impacted brain-injured auto accident survivors and the family members who have committed themselves to their loved ones’ care. BIAMI submits this Amicus Brief in Response to Defendants’ motion to stay the precedential effect of the Court of Appeals’ published decision to demonstrate to this Court the ongoing harm to brain-injured auto accident survivors and their families, and how that harm is magnifying the longer the survivors and their families have to wait for the insurance companies to resume paying the benefits that were bargained for by the survivors and their families (both when they purchased their Michigan No-Fault insurance policy and when they negotiated long-term care contracts with the insurance companies after their serious automobile accidents).

¹ Pursuant to MCR 7.312(H)(4), BIAMI states that neither party’s counsel authored this brief in whole or in part. BIAMI further states that none of the parties or their counsel contributed money that was intended to fund the preparation or submission of the brief and that no person other than BIAMI and its members made such a monetary contribution.

STATEMENT OF FACTS

This case was brought by Plaintiff-Appellants, in part, to challenge the constitutionality of MCL 500.3157(10), which limits No-Fault benefits for attendant care provided by family members to only up to 56 hours per week—effective July 1, 2021. When Defendants sought dismissal of the lawsuit, BIAMI filed an amicus brief in support of Plaintiffs.

On November 13, 2020, the Trial Court granted Defendants' motion to dismiss the case, and ruled that MCL 500.3157(10) applies retroactively to persons injured prior to enactment of the amendments to the act. The Court of Appeals ultimately reversed the Trial Court's decision in a published decision. The Court of Appeals held that the legislation could not retroactively apply to auto accident survivors and their caregivers for injuries incurred before the effective date of the statute. The insurance industry quickly filed an application for leave in this Court and also filed a motion to stay the precedential effect of the Court of Appeals' published decision while the Supreme Court case is pending.

ARGUMENT

- I. **Retroactive application of the new No-Fault Act has actively harmed auto accident survivors and their families who relied on medical care, attendant care, medical supplies, and transportation pursuant to the insurance policies they purchased to protect their families and pursuant to the contracts they signed with the insurance companies after there was an auto accident causing a need for benefits under those policies and according to the No-Fault Act as it existed at the time of their accidents.**

Under the No-Fault Act of 1973, MCL 500.3107, first party insurance provides for the reasonably necessary care for an injured person's care, recovery, and rehabilitation, which includes attendant care. Many brain injury accident survivors require 24-hour per day attendant care. These brain-injured auto accident survivors live at home with their parents, spouses, siblings, or some combination of family members. Often, family members have given up their careers so that they can take care of their loved ones, in reliance on their vested right to insurance coverage for that care. These brain injury survivors have been able to obtain superior care because the no-fault system protected them, and enabled family members to devote the 24/7 care these survivors require.

The new law caps reimbursement for family-provided attendant care at 56 hours per week (8 hours per day). MCL 500.3157(10). This limitation is made without regard to the extent of the brain-injured auto accident survivor's injuries or whether a doctor has prescribed more than 56 hours per week of attendant care. Likewise, the caps on the

dollar amounts for medical equipment, transportation, medical care, and attendant care – cutting all of those items by 45% -- have not only actively harmed brain-injured auto accident victims and their families but also the businesses who provided care to the survivors. Many of those business have closed since the new No-Fault Act went into effect (because the insurance industry immediately began to apply the Act retroactively) while others have had to turn away brain-injured auto accident survivors because they cannot afford to operate with only 55% of their business revenue.

According to a report from the MCCA, there are 18,000 auto crash survivors and 6,500 of those require 24/7 care because of spinal cord, brain, or other traumatic injuries. The other 11,000 require some care, therapies, medications, home modifications, durable equipment, supplies, transportation or other necessities provided through the No-Fault Act. (Annual Report of the Michigan Catastrophic Claims Association to the Senate Insurance and Banking Committee and House Insurance Committee For the Year Ended December 31, 2021 (issued September 1, 2022)).

The insurance industry continues to harm thousands of families – even after the published decision by the Court of Appeals, which held that the Act could not be retroactively applied to those auto accident survivors who were injured in an auto accident before July 1, 2019 – by filing a motion in this Court to stay the precedential effect of the Court of Appeals’ published decision. If granted, this means that not only will the Plaintiffs in this case remain in limbo while this appeal is pending before this Court, but it means that thousands of accident survivors and their families who were previously receiving benefits under the then-existing No-Fault Act, will continue to suffer under the insurance industry’s draconian efforts to apply the new Act retroactively for as long as possible.

This amicus brief will endeavor to share with this Court some examples of the negative consequences that have resulted to brain-injured auto accident survivors and their families who have been wrongfully subjected to the retroactive application of the new No-Fault law. This Court should **deny** Defendants’ motion to stay the precedential effect of the published Court of Appeals’ decision. While BIAMI urges this Court to additionally **deny leave to appeal**, it is imperative that this Court deny the motion for stay for the thousands of families in this State who are not parties to the *Andary* litigation, so that they can obtain immediate relief from the insurance companies’ denials or reduction of benefits to them even while the appeal is pending before this Court even while this appeal is pending.

A. Thousands of auto accident survivors and their families are being actively harmed by the insurance industry's continuing retroactive application of the No-Fault law.

Several members of BIAMI have formed a grass roots FaceBook group called “We Can’t Wait” so that the families and caregivers of brain-injured accident victims could share their horror stories of how the loved ones and families have suffered since the insurance industry began to retroactively apply the new No-Fault legislation. (09/19/2022 Peggy Campbell Interview). The organization is called “We Can’t Wait” for a reason – these accident survivors’ lives are literally on the line and their families are facing destitution and mounting debt just to provide a fraction of the care that the accident survivors were receiving before July 1, 2019. Jackson, *Supporters of car crash survivors start summer protest series*, Michigan Radio (July 12, 2022).

Although We Can’t Wait was only formed in April 2021, the group has grown to nearly 9,000 members. (09/19/2022 Peggy Campbell Interview). Co-founder Peggy Campbell explained that “Every day there are stories of the devastation that is taking place because of the change.” (09/19/2022 Peggy Campbell Interview). Ms. Campbell recounted: “There are different stories and tragedies but one underlying theme. Before the reform, survivors were leading meaningful lives, although life proved a challenge, most living happily on their own, with their families or in specialized facilities. Care and therapies were provided through or by family members.” (09/19/2022 Peggy Campbell Interview). However, since the new No-Fault law went into effect on July 1, 2021, “it has been a downward spiral for survivors, care agencies, providers and specialized facilities. They go hand in hand. Survivors and families had a normalcy and quality of life that came to a sudden halt with the implementation of the reform that cut reimbursements by 45%. Many agencies and specialized facilities changed their business model, no longer accept auto accident patients, or closed. This has been disastrous to survivors and families left without care, not to mention thousands of caregivers without work.” (09/19/2022 Peggy Campbell Interview)

But the devastation did not stop with the 45% cut in reimbursements. “The other devastating consequence of the reform is the 56-hour limit on family care. One of the most humane aspects of the prior No-Fault Act was that families could provide care for their loved ones or continue working in their career fields while their loved ones were cared for by agency caregivers, relatives, or friends. Sometimes family members are forced to abandon their careers because caregivers did not show up or were not properly trained. Some survivors with a TBI were intolerant of strangers, exhibited bizarre behaviors, were belligerent or refused to take direction from a caregiver. A benefit of the

prior No-Fault Act was these family members could be compensated as a caregiver which allowed them to pay bills, while also being far cheaper for the insurance company than a professional agency.” (09/19/2022 Peggy Campbell Interview).

Ms. Campbell shared that there have been recurring problems with the new No-Fault law because it has made it “nearly impossible for family members to work outside the home because there are no outside caregivers coming into the homes due to the 45% pay cut.” (09/19/2022 Peggy Campbell Interview). The tragedy continues for these many families struggling to get by: “without that income provided by being the caregiver, they cannot pay bills and increasingly they are losing their cars, homes, and are having to move in with relatives, often aged parents.” (09/19/2022 Peggy Campbell Interview).

The dire circumstances these brain-injured auto accident survivors are facing are the tragic result of the insurance industry’s retroactive application of the new No-Fault law. BIAMI shares a few examples here to show why this crisis situation needs to be fixed immediately –which this Court can do simply by denying Defendants’ motion to stay (and then later denying their application for leave).

Deaths of Auto Accident Survivors

Auto accident survivors who were managing with the care under the prior No-Fault law have died once their benefits were drastically reduced by their insurance company. One report recounted four such deaths after auto accident survivors had benefits slashed. “Enough is enough,” stated Tom Constand, the President of BIAMI. “When you go through a [memorial] service like this today and hear about the lives that were lost because of the change in their care, and how quickly they slipped off the scale, it's time to do something.” Samilton, *Car crash survivors who dies after losing care are memorialized in service at Lansing church*, Michigan (March 2, 2022).

Fox 2 Detroit reported on one of the causes of increased deaths among auto accident survivors: “Reportedly since the law took effect in July - 1,500 crash victims have been discharged from medical facilities, 3,000 thousand jobs have been eliminated, and we are told insurance won't even pay for the most necessities. ‘People are not able to get catheters to catheterize - and one of the primary reasons we lose people that are paralyzed, is urinary tract infections.’” Asher & Komer, *Auto insurance reform has decimated long-term health care for crash survivors, families say*, Fox 2 Detroit (March 17, 2022).

Auto accident survivors living at home are now being forced into institutions

Former Red Wings hockey player and brain-injured auto accident survivor, Vladimir Konstantinov, has helped bring attention to the havoc wreaked on auto accident survivors since July 1, 2021. “Next week, Konstantinov is in danger of losing the round-the-clock care that has enabled him to remain home. Due to the high costs of such care and changes to a Michigan law, he might be moved to an institution where restraints or medication would be necessary to keep him safe.” Lage, *New law puts NHL great Konstantinov’s 24/7 care in jeopardy*, Associated Press (May 27, 2022). State representative Phil Green (Republican) sponsored a bill to raise the reimbursement amounts for rehabilitative treatment and home-based care. He noted that, while both the health care and insurance side “need[ed] a hair trim,” the reality from the new No-Fault Act is that “the home health attendant care as well as the rehab facilities” received “more of a scalping.” Lage, *New law puts NHL great Konstantinov’s 24/7 care in jeopardy*, Associated Press (May 27, 2022). Yet in spite of these tragic stories, the Legislature has failed to fix the legislation.

Another tragic example of how the new No-Fault legislation impacted auto accident survivors is the case of Brian Woodward. Mr. Woodward did not suffer a brain injury, but instead was rendered quadriplegic by his auto accident. In spite of his physical limitations, Mr. Woodward represented a true success story of the no-fault system – until 2021 and the retroactive application of the new No-Fault law. See *In the Name of the Law, Woodward Segment*, WLAJ 53, Season 3, Episode 9 (aired on July 13, 2022). (<https://youtu.be/mj5JChEE85A>)

After his auto accident, Mr. Woodward was gainfully employed as a contractor at Ford Motor Company. But on July 1, 2021, his caregivers could not afford the 45% cut to reimbursements. Due to the loss of his caregivers, Mr. Woodward had no choice but to abandon his home which had been modified to accommodate his lifestyle and needs. He was forced into tiny room in a nursing home, which nursing home was not prepared to care for a disabled catastrophically injured person. The result was that Mr. Woodward was in and out of the hospital with various infections and almost died of sepsis. He now lives in a rehab facility. His quality of life is greatly diminished. He can no longer participate with his church, sing in the choir, manage a little league team, or be a sportsman. And many other things he enjoyed in life were ripped from him. He lost his job, health insurance, dental and vision care, and 401K. Colthorp & Clarke, *Man paralyzed in crash speaks out against Michigan’s no-fault auto reform: ‘I had a life. I don’t have one now.* Click on Detroit (March 21, 2022).

Auto accident survivors are regressing with cuts to their care

“Braxton Wood survived a catastrophic car crash when he was 17. His spinal cord injury was partial, and he said thanks to intensive physical therapy, he was close to being able to walk nearly a half mile with braces and a cane. But the no fault law cut payments by nearly 50% to the caregivers who drove him to those PT appointments. They discharged him as a patient as a result. Now, he's back in a wheelchair full-time.” Samilton, *Red Wings legends Vlad Konstantinov and Darren McCarty appear at Detroit rally for no fault insurance fix*, Michigan Radio (June 24, 2022).

Michael Wallace was severely injured in a car accident 26 years ago and is paralyzed from the shoulders down and suffers from a traumatic brain injury. Samilton, *Changes to no-fault auto insurance law push car crash survivor toward death*, Michigan Radio (January 19, 2022). “[O]n July 1, Auto-Owners began slashing payments for his nursing care nearly in half, under the new auto no-fault law. And on December 31, the home care agency finally said it couldn’t afford to stay on any longer. The nurses left. The aides left.” Samilton, *Changes to no-fault auto insurance law push car crash survivor toward death*, Michigan Radio (January 19, 2022).

“Michael still doesn’t have any professional home care, and his dad and other relatives are still struggling to fill shifts caring for him. They're paying for nurses' visits out of pocket. Michael said he's slept in his wheelchair multiple nights in a row to reduce the number of times he is transferred to bed by someone without medical training. Michael is supposed to receive catheterization every two to three hours – a procedure that should be performed by a nurse – but he said he has reduced his fluid intake so that he can stretch out the time between procedures. Infrequent catheterization in someone with quadriplegia can be life-threatening, causing a condition known as autonomic dysreflexia, a sudden and dangerous spike in blood pressure.” Samilton, *Changes to no-fault auto insurance law push car crash survivor toward death*, Michigan Radio (January 19, 2022).

“Kelley Miller was paralyzed from the neck down in a 2011 auto crash, now needing a ventilator to breathe. Despite this, she has been able to live a fulfilling life in her home outside of the Lansing area, because of the medical benefits provided to her after the crash via her no fault auto insurance policy.” Martin, *How did we get here?: Crash survivor forced into hospital after no fault auto law changes*, Fox 17 (Jan 17, 2022). Ms. Miller requires 24/7 care and a skilled nurse to keep her breathing machine working, along with a home health aide to prevent bedsores. Livengood, *My patient is a pawn: Insurer, health providers trade blame as quadriplegic heads to hospital*, Crain’s Detroit (January 20, 2022). “Because [Miller’s nurse] Curry and her business would be losing money if they continued to operate under these new fee schedules, they were forced

into a situation where they could no longer care for the woman that has become like family to them.” Curry had to call 9-1-1 to have an ambulance come pick Miller up. ‘She has a good life here with our caregivers, with her husband, with her family. She does not deserve to go to the hospital, or to be placed in a facility,’ Curry told FOX 17 as they waited for Miller to be loaded into the ambulance.” Martin, *How did we get here?: Crash survivor forced into hospital after no fault auto law changes*, Fox 17 (Jan 17, 2022).

BIAMI and the Michigan Public Health Institute commissioned an independent survey of brain-injured auto accident survivors to gauge how their lives have changed since July 1, 2021. Among the 498 respondents, the following outcomes were reported:

- Increased feelings of anxiety, depression, or despair - 66%
- Increase in health and medical problems - 33%
- Lack of progress in rehabilitation - 35%
- Increase in behavioral problems - 32%
- Unable to get needed Durable Medical Equipment - 18%
- Medication errors due to lack of support - 14%
- Unable to get medications or missing medical appointments - 8%
- Unable to get needed transportation - 15%
- Hospitalizations - 8%
- Had to move into other residential setting – 3%

BIAMI/MPHI, *Survey Results from a Study Tracking Impact of the 55% Fee Cap and 56-hour Family-Provided Home Care Limit on Crash Survivors Following the 2019 No-Fault Auto Insurance Reform*, pp. 15-16 (September 21, 2022).

Survivors’ families are also suffering

The retroactive application of the new No-Fault legislation has also placed tremendous stress on the families of brain-injured auto accident survivors. For example, Diane Mills-Gutierrez needs 24/7 care and was cared for by her husband for 90 hours a week. But when it was cut to 56-hours a week, they could not pay the bills. They had to sell their car and are at-risk for losing their house. Ms. Mills-Gutierrez’s husband tried to get work to supplement but it is difficult to find care givers and even when they do, several cancel in a week which the husband must cover. They take money from their savings and won’t be able to hold on much longer. They live in a constant state of not knowing what’s going to happen.

Virginia Robison lost \$120 week and cannot afford her house where she cares for her disabled son. She sold her home and moved in with another son. She subsidizes vacation pay for staff as they have no agency and insurance pays directly. Her son **Rick Robison** posted on We Can't Wait: "At a very expensive time during the "Covid Pandemic" and months of the insurance company not paying for caregivers, I had no other option than to have a 782 square foot addition built onto my house to prevent my mother and brother from becoming homeless. It is nearly complete and now that the housing market is beginning to taper off, my mother stands to lose a lot of money on the sale of her house. Everyone involved is totally stressed out. She is also working 64 hours a week and only being paid for 56."

B. Commercial care providers have been unable to sustain viable businesses with the retroactively imposed caps on medical care and benefits.

Since insurance industry began to apply the new No-Fault legislation retroactively, 6,857 crash survivors have been discharged from local care providers, and 4,082 health care workers have lost their jobs. Martin, *Look at the facts and act': 2nd report on impact of No-Fault law changes is released*, Fox 17 (August 11, 2022). The report found that 10 care companies have had to close their doors completely since the changes took effect, while 14 more companies expect to close in the next 12 months." Martin, *Look at the facts and act': 2nd report on impact of No-Fault law changes is released*, Fox 17 (August 11, 2022).

As reported on Michigan Radio, "Changes to Michigan's auto no-fault insurance law have slashed insurance company payments to long-term care providers by nearly half. People rely on those providers to stay alive after their crashes, but the cuts are so deep that some are going out of business. State legislators and the governor were warned that the changes would be devastating and result in massive suffering and deaths." Samilton, *Car crash survivors who dies after losing care are memorialized in service at Lansing church*, Michigan Radio (March 2, 2022).

In addition, the CEO of Neurocare Home Health said his "business was severely impacted by the reform. He said for about every hour of care they give, they lose about five dollars, which adds up fast." Holland, *"We can't give up": Auto crash survivors rally for no-fault reform in Lansing*, WTOL (April 12, 2022). "Larger facilities are also feeling the pinch from the insurance reimbursement cap for auto crash survivor clients. BSHS, Beaumont Health and Spectrum Health's chief financial officer said in the eight months since the changes were in effect, their payments were cut by \$65 million. ... One of the

biggest impacts of the reform for Spectrum Health is closing Residential Rehabilitation, a long-term neuro care program.” Holland, *“We can’t give up”: Auto crash survivors rally for no-fault reform in Lansing*, WTOL (April 12, 2022).

Indeed, even though the legislature set up a fund to help the commercial care agencies, “One year after its establishment by the state legislature, a \$25 million fund designed to help financially struggling companies that take care of car crash survivors has awarded nothing. Samilton, *A year later, \$25 million fund has awarded \$0 to companies that can’t afford care for car crash victims*, Michigan Radio (Aug 21, 2022). The fund was intended to help some of the agencies that saw their reimbursements cut nearly in half as part of Michigan's 2019 no fault law. Contrary to the fund’s stated intent, “agencies that have applied for the funds say its rules make it virtually impossible to qualify for assistance.” One example is Best Care Nursing Services in Grand Rapids. The agency's Deanna Cronk said “the application process was time consuming, labor-intensive, expensive, and required submitting thousands of pages of documents. ‘And in the end we basically did all of these things for absolutely zero benefit to our company,’ she said. ‘At this point I no longer will look to DIFS to help in any way.’ Cronk said “with no hope of accessing grants from the fund to offset losses, the agency will likely have to close in a few months. The company only has 15 of its most vulnerable patients left, having discharged those that had other options for care last year, such as being taken in by family members.” Samilton, *A year later, \$25 million fund has awarded \$0 to companies that can’t afford care for car crash victims*, Michigan Radio (Aug 21, 2022).

Due to the retroactive application of the new No-Fault law, “Cronk and other care professionals say most nursing homes are now refusing to accept auto accident patients with traumatic brain injuries or spinal cord injuries, or both, because such individuals usually end up on Medicaid, which doesn't cover the high-tech care they require. DIFS, in a statement, said DIFS’ role is to implement the law as written.” Samilton, *A year later, \$25 million fund has awarded \$0 to companies that can’t afford care for car crash victims*, Michigan Radio (Aug 21, 2022).

One commercial care provider expressed the anguish for his patients who have now lost care. Bob Mlynarek reported that he "had to discharge a middle-aged female quadriplegic. Her elderly father is now the only help she has. No medical training or experience. Has to cath her 4 to 6 x per day, bowel programs. Full body wash.” (09/17/22 Bob Mlynarek Interview). Mr. Mlynarek shared that many of his patients have experienced serious regression since July 1, 2021: “I have patients that were progressing, learning to walk and talk again, then insurance stopped paying for therapies and

transportation to the sessions.” (09/17/22 Bob Mylnarek Interview). Mr. Mylnarek had another patient on a ventilator and with a doctor’s prescription for a nurse and aide. But instead “All companies have left because of low reimbursement for such a high acuity case. Insurance is paying non trained family \$13 per hour. No nurses.” (09/17/22 Bob Mylnarek Interview).

As this sampling of stories patient, family members, and professional care providers reveal, the retroactive application of the new No-Fault legislation has had a immediately devastating impact on brain-injured auto accident survivors. The survivors, their families cannot wait for this Court to decide the insurance industry’s appeal. This Court should deny Defendants’ motion to stay the precedential effect of the *Andary* decision.

CONCLUSION AND REQUEST FOR RELIEF

Retroactive application of MCL 500.3157(10) has actively harmed brain injury survivors who receive family-provided attendant care, while costing the insurance industry and taxpayers more money. BIAMI respectfully requests this Court deny Defendants’ Motion to Stay the precedential effect of the *Andary* decision.

September 26, 2022

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